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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte*
Verizon "No Facilities" Policy
CC Docket Nos. 96-98 and 01-138
CCB/CPD No. 01-06.

Dear Ms. Attwood:

In this letter, the undersigned competitive local exchange carriers ("CLECs")[1] urgently request that the Commission take steps to require changes in Verizon's practice of declining to provide DS1 UNEs based on "no facilities" available. Verizon's "no facilities" policy appears to reflect a growing trend among ILECs to escape or unreasonably limit their obligation to modify existing loops as part of their provision of unbundled access to loops even when they perform the same modifications for their own retail customers.[2] The undersigned CLECs are very concerned that ILECs will attempt to use "no facilities" as a wide-ranging new tool to limit their obligations to provide unbundled network elements ("UNEs") under Section 251(c)(3). ILECs increasingly appear to view the "no facilities" theory as an opportunity to thwart CLECs' ability to provide a range of very competitive voice and data services using DS1 loops made possible by next generation technologies. In addition, Verizon's policy of refusing to provide UNEs and requiring CLECs to purchase special access service appears to be a manifestation of a larger policy to shift facilities and services provided to CLECs to separate and inferior networks. The undersigned CLECs urge the Commission to promptly stop ILECs from unreasonably limiting their obligations to provide UNEs and assure that they offer UNEs on reasonable and nondiscriminatory terms and conditions as required by Section 251(c)(3) of the Act.

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[1] Adelphia Business Solutions, Inc., ("Adelphia"), Broadslate Networks, Inc. ("Broadslate"), Focal Communications Corporation, Madison River Communications, LLC ("Madison River"), Mpower Communications, Corp. ("Mpower"), and Network Plus, Inc. ("Network Plus").

[2] A number of ILECs apparently have comparable or worse "no facilities" policies. See Letter from XO Communications, Inc. to Magalie Roman Salas, CC Docket No. 96-98, filed August 24, 2001, p. 7, concerning Qwest and Verizon "no facilities" policies.

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In its recent grant of Verizon's application to offer interLATA service in Pennsylvania, the Commission found that Verizon's practices concerning provisioning of high capacity loops, as explained by Verizon in that proceeding, did not expressly violate the Commission's unbundling rules. The Commission stated, however, that Section 271 applications are not the appropriate proceedings to address disputes that do not involve *per se* violations of its rules, new interpretive disputes concerning the precise content of ILECs' obligations to their competitors, or disputes that its rules have not yet addressed.[3] While the undersigned CLECs reserve the position that Verizon's new "no facilities" policy violates current rules, in particular loop conditioning rules, at a minimum this policy raises an issue that the Commission has not sufficiently addressed in its unbundling rules, namely to what extent are ILECs entitled to decline to provide UNEs, or impose additional charges, based on the need to modify existing facilities.

The Commission has not adequately clarified when ILECs may decline to provide UNEs because some modification to particular facilities in the existing network are required, including minor routine modification such as installation of multiplexers and line cards. The undersigned CLECs urgently request that the Commission establish policy and rules governing this area in order to assure that ILECs meet their obligation to provide UNEs on reasonable and nondiscriminatory terms and conditions as described in this letter. The undersigned CLECs request that the Commission do so by determining that Verizon must provide CLECs with unbundled broadband loops in all circumstances in which it would provide the same functionality to its own retail customers and that it direct Verizon to do so as a declaratory ruling in response to this letter. In addition, or to the extent necessary, the Commission should propose a rule to that effect in the upcoming NPRM concerning establishment of provisioning standards for special access and UNEs and adopt it on an expedited basis.

Verizon Has Not Established a Lawful Basis for Its "No Facilities" Policy

In the few instances where Verizon has attempted to articulate a lawful basis for its "no facilities" policy, it has grossly mischaracterized and otherwise misapplied the *Local Competition Order,*[4] the *UNE Remand Order*,[5] and *Iowa Utilities Board.*[6] Verizon has stated that it has no legal obligation to install additional electronics to provide DS1 or DS3 service to CLECs at UNE rates.[7] In support, it cites the *Local Competition Order* wherein the Commission stated that "we expressly limit the provision of unbundled interoffice facilities to existing

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[3] *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, released September 19, 2001, para. 92.

[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996)("*Local Competition Order*").

[5] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999)("*UNE Remand Order*").

[6] *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)("*Iowa Utilities Board*"), *reversed on other grounds, AT&T Corp. v. Iowa Util. Bd.*, 119 S.Ct. 721 (1999).

[7] Answer and Affirmative Defenses of Verizon Virginia Inc., Case No. PUC010166, Virginia State Corporation Commission, filed September 10, 2001, p. 4-5.

incumbent LEC facilities." [8] Verizon's attempt to exalt this snippet from the *Local Competition Order* into a sweeping legal excuse not to modify, or attach necessary electronics to, existing loops is a gross mischaracterization and misapplication of what the Commission actually said. First, this existing facility limitation only applies to interoffice facilities. There is nothing in the *Local Competition Order* to suggest that this limit on provision of interoffice facilities expresses, or was intended to express, the limits of ILEC obligations under Section 251(c)(3) for provision of unbundled loops, UNEs in general, or even interoffice facilities. Rather, this limitation on interoffice UNEs was apparently a pragmatic approach to assure that small ILECs were not unreasonably burdened in providing interoffice facilities. Thus, contrary to Verizon's view, the Commission did not state that ILEC UNE obligations as a general matter were defined by existing facilities and apparently limited provision of interoffice UNEs to existing facilities because of possible burdens on small ILECs.[9] There is no comparable limit on provision of DS1 and DS3 loop UNEs. Therefore, the cited statement in the *Local Competition Order* does not specifically justify Verizon's "no facilities" policy with respect to loops or otherwise establish an overarching principle that could justify ILEC's refusal to provide UNEs based on "no facilities."

Verizon also relies on a statement in the *UNE Remand Order* that "we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use." However, this statement only relieved ILECs from the obligation to construct entirely new interoffice links between new points specified by the CLEC. This is a far cry from installation of electronics and other facilities on loops that ILECs routinely provide for their own customers. The *UNE Remand Order* did not relieve ILECs from any obligation to construct new interoffice facilities between existing points in the network or establish any principle that ILECs are not required to augment or modify facilities in the existing network in order to provide UNEs, whether loops or unbundled transport. In any event, as in the *Local Competition Order*, the Commission in the *UNE Remand Order* did not make any comparable statement with respect to ILEC obligations to provide loop UNEs. Thus, the *UNE Remand Order* does not support Verizon's "no facilities" policy.

Verizon also relies on the statement in *Iowa Utilities Board* that "Section 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not a yet unbuilt superior one."[10] However, the undersigned CLECs are not requesting a superior network. Rather, the undersigned CLECs are requesting that Verizon provide unbundled access to the same network that ILECs provide to their own retail customers. The undersigned CLECs request that Verizon undertake only the placement and replacement of facilities that is routine in the existing network, not that Verizon build a new, superior network. Moreover, "network" as used by the Supreme Court means the type of technology and facilities that the ILEC actually currently deploys and when and how it ordinarily deploys them in the aggregate. Thus, the existing network includes the types of electronics that ILECs ordinarily attach to loops, even if not attached to particular loops, and it does not constitute provision of a new network to attach routine electronics to a loop. Therefore, whatever application the Supreme Court's no "superior

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8 *Local Competition Order*, para. 451.

9 *Local Competition Order, Id.*

10 *Iowa Utilities Board*, 120 F.3d 753, 813.

network" limitation may have, it does not justify Verizon's specific policy of declining to provide as loop UNEs what it provides to its own retail customers as part of its existing network.

Verizon also contends that the Commission's rules requiring line conditioning do not require it to install electronics and other equipment necessary to provide DS1 and DS3 loop UNEs because line conditioning involves removal of equipment, whereas the undersigned CLECs and others are requesting that Verizon add equipment. Regardless, of whether the current line conditioning rules invalidate Verizon's "no facilities" policy, which they do, the undersigned CLECs submit that there is absolutely no meaningful legal distinction under Section 251(c)(3) between ILECs removing or adding equipment. Significantly, there is no language in the Act that would so dramatically alter ILEC obligations to provide UNEs depending on whether the ILEC is adding or removing equipment. The point is that ILECs must affirmatively take the steps necessary to provide for CLECs as UNEs the same functionality that they use for their own retail customers whether these affirmative steps involve additions to, or removal of equipment from, the loop. Accordingly, the Commission should reject Verizon's attempt to convert a trivial factual distinction into a major statutory legal limitation on its obligation to provide UNEs. Thus, Verizon's obligation under Section 251(c)(3) are not defined by whether Verizon technicians remove equipment from, or add it to, the loop. Further, the loop conditioning rules represent a recognition by the Commission that ILECs have an obligation to take steps to provide as network elements the same functionality that they provide to their own retail subscribers.

To some extent Verizon also apparently seeks to justify its obligation that CLECs purchase special access in order to obtain DS1 loop functionality based on pricing concerns. However, the issue of whether and to what extent ILECs may charge for providing as UNEs the minor enhancements to loops that the undersigned CLECs request in order that they may receive DS1 functionality is essentially the same issue that has been raised by Mpower in its currently pending petition concerning loop conditioning charges.[11] In fact, ILECs may not impose any separate charges for loop conditioning, or for attaching electronics to loops, because it is inconsistent with TELRIC for all the reasons stated in Mpower's petition. The undersigned CLECs urge the Commission to promptly consider and grant Mpower's petition.

The Commission May Require ILECs to Modify And Attach Electronics to Loops

For the reasons explained above, Verizon has not provided any lawful basis for its cramped view of its unbundling obligations. More than that, however, the undersigned CLECs stress that the Commission may, pursuant to Section 251(c)(3) require ILECs to attach electronics and take other affirmative steps, such as reconfiguration and installation of multiplexers and equipment cases, in order to provide DS1 and DS3 loop UNEs. Section 251(c)(3) requires that ILECs provide UNEs on "conditions that are just and reasonable ..." In the recent *Collocation Remand Order*, the Commission found that the comparable provision in Section 251(c)(6) provided the Commission substantial authority to impose conditions on ILECs provision of collocation, including provision of cross-connection between collocated CLECs

[11] *Mpower Communications Corp. Files Petition For Expedited Declaratory Ruling on TELRIC Pricing Standards for Loop Conditioning Charges, Public Notice*, CCB/CPD No. 01-06, DA 01-684, March 16, 2001.

even though this was not directly "necessary" for interconnection or access to UNEs.[12] Similarly, the Commission may require ILECs to perform routine enhancements to loops, such as attachment of electronics, as a reasonable condition of provision of loop UNEs. Indeed, the requirement under Section 251(c)(3) that ILECs provide UNEs on reasonable terms and conditions provides a deep font of authority for the Commission to assure that ILECs do not unreasonably restrict the availability of UNEs in ways that effectively prevent CLECs from providing competitive services.

Section 251(c)(3) also requires that ILECs provide UNEs on nondiscriminatory terms and conditions. Simply stated, it constitutes a fundamental discrimination against CLECs for ILECs to routinely provide network capabilities to their own retail customers while refusing to do so for CLECs as UNEs. Moreover, as explained below, this significantly harms CLECs, as well as thwarting the pro-competitive goals of the Act. CLECs will not be able effectively to compete in the local marketplace if they are not able to provide service to customers on comparable terms as the ILEC because the ILEC will not provide as UNEs the same functionality that it provides to its own retail customers. Accordingly, the Commission may under Section 251(c)(3) require ILECs to provide enhancements to loops that they provide to their own retail customers in order to assure non-discriminatory provision of UNEs.

Several State Commission Have Reached the Correct Conclusion

The Illinois and Michigan commissions have considered and rejected the view that ILECs are not required to provide a network element as a UNE where the ILEC must engage in construction activities to do so. Ameritech had contended that loops are not available as UNEs unless all of "the required components already exist in a fully connected fashion."[13] The Illinois and Michigan commissions rejected Ameritech's cramped view of its unbundling obligations finding that Ameritech was required to provide the loop as a UNE even if this required some construction activity. The ICC stated:

> Ameritech's current definition [of "available"] does not provide (1) adequate parameters for determining in advance whether a UNE will be available and (2) a sufficient safeguard against discriminatory implementation. Under Ameritech's definition, a CLEC will not know if a UNE is available until it is told so by Ameritech. With regard to Ameritech's contention that its definition is consistent with the Eighth Circuit's determination that it is only obligated to provide unbundled access to its existing network, the Commission agrees with [CLECs] that the evidence presented indicates that CLECs have not sought access to a new or superior network, but only access to the network that Ameritech presently owns and manages on a nondiscriminatory basis.[14]

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[12] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-147, FCC 01-204, released August 2, 2001, paras. 80-84, ("*Collocation Remand Order*").

[13] *BRE Communications, L.L.C., d/b/a Phone Michigan v. Ameritech*, Opinion and Order, Case No. U-11735, p. 8, (Mich. PSC February 9, 1999)("*MPSC Order*"); *Illinois Bell Telephone Company, Investigation of Construction Charges*, Order, 99-0593, ICC August 15, 2000)("*ICC Order*").

[14] *ICC Order*, p. 20.

Both the Michigan and Illinois commissions also found that Ameritech was required to treat CLECs in the same manner as its own retail customers. The Michigan PSC rejected Ameritech's view "that it is not required to treat CLECs in the same manner as it treats retail customers."[15] The Michigan PSC stated that if Ameritech's "description of nondiscriminatory treatment were to be adopted, Ameritech Michigan would be free to treat all CLECs in an anticompetitive manner so long as it applies such treatment equally to all CLECs, irrespective of how it treats itself or its end-user customers."[16] Similarly, the ICC rejected Ameritech's view to the effect that "so long as Ameritech provides UNEs to all CLECs, itself, and its affiliates on the same terms, it does not matter how Ameritech treats and recovers its costs from its retail end users for the same activity."[17] Both state commissions required Ameritech to modify loops essentially anywhere within its existing network within its service territory and prohibited Ameritech from imposing special charges in certain respects when Ameritech determines that it cannot provide a requested UNE without construction activities.

The undersigned CLECs urge the Commission, like the Illinois and Michigan commissions, to determine that ILEC's must provide a loop as a UNE even when construction activities are required, that this does not constitute construction of a new or superior network, and that ILECs must do so in the same manner as they provide or construct the facility for its own retail customers. Again, to the extent a pricing issue is involved, the undersigned CLECs urgently request that the Commission resolve pricing issues raised in Mpower's pending loop conditioning petition.

Verizon's Policy Violates the "Best Practices" Requirement of the BA/GTE Merger Order

In the *BA/GTE Merger Order*, the Commission anticipated that its conditions "will require the merged firm to spread best practices throughout its region."[18] As noted below, Verizon's new "no facilities" policy was apparently adopted to conform the practices of the former Bell Atlantic to that of the former GTE. The undersigned CLECs respectfully submit that GTE's practice was not the best practice of the pre-merger companies, and that institution of this practice throughout the Verizon region was in fact adoption of an unreasonable, discriminatory, and unlawful policy for all the reasons described in this letter. Accordingly, the Commission should determine that Verizon's new policy violates the *BA/GTE Merger Order*.

Verizon's Policy Disadvantages CLECs

The undersigned CLECs stress that Verizon's "no facilities" policy is new and that it significantly harms CLECs. Although Verizon claims that it is not a new policy, this is belied by the fact that Verizon recently issued a notice to CLECs notifying them of this policy[19] and by the fact that at the same time the number of "no facilities" responses received by CLECs went through the roof. For example, prior to this new policy, approximately 98% of Broadslate's

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15 *MPSC Order*, p. 11.

16 *Id.* p. 29.

17 *ICC Order* p. 97.

18 *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, Memorandum Opinion and Order, CC Docket No. 98-184, FCC 00-221, released June 16, 2000, para. 354 ("*BA/GTE Merger Order*").

19 *DS1 and DS3 Unbundled Network Elements Policy*, Verizon, July 24, 2001.

DS1 UNEs were completed, whereas after, and currently, only about 50% are completed. At the time, Broadslate was informed by Verizon representatives that Verizon was changing its practices in the former Bell Atlantic territory in order to conform to practice in the former GTE territory. Thus, as noted, Verizon apparently perversely chose to adopt a "worst practices" approach. Moreover, many other CLECs at about the same time also observed a sustained spike in the number of "no facilities" responses received as evidenced by the fact that they promptly brought this to the attention of the Commission in Rocket Docket proceedings,[20] in the Verizon Pennsylvania 271 proceeding,[21] and before state commissions.[22]

Apart from the fact that Verizon initiated its policy without prior notice, even before it issued its advisory to CLECs, Verizon's policy significantly harms CLECs because CLECs do not know in advance what loops are subject to a "no facilities" response. Nor are they informed what facilities are ostensibly missing. Under Verizon's policy, Verizon will decline to provide DS1 UNEs in a large number of circumstances, including where new or reconfigured multiplexers or new apparatus cases in the central office or at the customer's premises are required.[23] CLECs have no knowledge of what loops will fall into this category or, when they receive a "no facilities" response what the reason is. This prevents CLECs from being able to effectively market service.

CLECs are further disadvantaged by Verizon's "no facilities" policy because Verizon insists that CLECs may obtain DS1 functionality in cases of "no facilities" only by ordering special access service. Then, in order to obtain the requested network functionality as a UNE which CLECs have a right to obtain under Section 251(c)(3), they must first order this as special access and then convert this to a UNE – assuming the ILEC offers this conversion on reasonable terms and conditions. Apart from the fact that refusing to provide the facility as UNE is unlawful for all the reasons stated above, this harms CLECs as a practical matter because not all ILECs permit conversion of single element special access service to the equivalent UNE on reasonable terms and conditions. BellSouth, for example, has recently informed Mpower that it will only permit conversion of DS1 and DS3 loop UNEs for a $1,000 and $9,000 charge, respectively.[24] Obviously, these charges vastly exceed the cost of what is no more than a billing change for an in-place facility. Moreover, nonrecurring charges associated with the provision of special access broadband capacity loops, and special access service charges, can themselves effectively prohibit meaningful competition. Therefore, the requirement that CLECs order special access and then convert this to a UNE is both unnecessary and provides ample opportunity for ILECs to impose unreasonable charges and delays on provision of UNEs in violation of Section 251(c)(3). CLECs are further disadvantaged by Verizon's "no facilities" policy because Verizon has a particularly poor track record in provisioning special access, as

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[20] *See* Letter from Cavalier Telephone Company to Chief, Market Disputes Resolution Division, July 7, 2001.

[21] *See* Comments of Broadslate Networks, Inc., CTSI, Inc., and XO Communications, Inc., CC Docket No. 01-138, filed July 11, 2001, p. 7.

[22] Petition of Broadslate Networks of Virginia, Inc. for Declaratory and Other Relief; and Request for Expedited Relief, Case No. PUC010166, Virginia State Corporation Commission, filed August 3, 2001.

[23] *See* Letter from Verizon to Magalie Roman Salas, CC Docket No. 96-98, filed August 21, 2001.

[24] *See* Letter from Adelphia Business Solutions, Inc. *et al* to Chief Market disputes resolution Division, September 12, 2001.

shown by proceedings before the New York Public Service Commission.[25] Moreover, Verizon's expansive view of when no facilities are available, its insistence that CLECs order special access instead of UNEs, and imposition of a host of practical impediments on conversion of special access to UNEs are a manifestation of a larger goal to disadvantage CLECs by shifting them to separate and inferior legacy networks while immunizing new, advanced ILEC networks from unbundling obligations.

Conclusion

For all the reasons stated above, the undersigned CLECs urgently request that the Commission establish requirements governing when ILECs may, if ever, decline to provide loops on the grounds that no facilities are available. The undersigned CLECs request that the Commission determine that ILECs must take the same affirmative steps to provide DS1 and DS3 UNEs to CLECs that the ILEC takes to provide retail service to its own customers. The Commission should reject the limitations that Verizon seeks to impose under its "no facilities" policies as unreasonable, discriminatory, and unlawful under Section 251(c)(3). The undersigned CLECs request that the Commission establish these requirements in the form of a declaratory ruling in response to this letter interpreting Section 251(c)(3). In addition, or to the extent necessary, the Commission should propose to establish rules requiring this result in the upcoming special access and UNE provisioning NPRM. The Commission should also resolve any pricing issues associated with construction activities involved in providing UNEs by determining in the context of Mower's loop conditioning proceeding that any special charges are inconsistent with TELRIC. The Commission should take these and other steps to assure that ILECs are not successful in forcing CLECs to separate inferior and more expensive legacy networks.

Sincerely,

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[25] Focal Communications Corporation of New York v. New York Telephone Company d/b/a Bell Atlantic of New York, Case No. 00-C-1390, filed August 15, 2000.

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